No. 83-142

Office-Supreme Court, U.S.
FILED
JUL 29 1983
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1983

PATRICK DIXON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the evidence was sufficient to sustain a conviction for knowing possession of a gun and a silencer, under Title 18, Section 1202(a)(1) (App.) and Section 5861 of Title 26 of the United States Code.

2. Whether the evidence was sufficient to sustain a conviction under Section 1202(a)(1) (App.) of Title 18 and Section 5861 of Title 26 absent proof of actual or constructive possession of a gun and silencer.

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Judgment Order of the United States Court of Appeals for the Third Circuit 1a

No.

In The

Supreme Court of the United States

October Term, 1983

PATRICK DIXON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner Patrick Dixon respectfully prays to this Honorable Court that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, which affirmed his judgment of conviction entered upon a jury verdict of guilty.

OPINION BELOW

The judgment order of the United States Court of Appeals for the Third Circuit was entered on June 10, 1983 and is annexed

hereto (Appendix, 1a). The instant petition for a writ of certiorari was filed within sixty (60) days of that date.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Section 1254(1) of Title 28 of the United States Code, 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

Section 1202(a)(1) of Title 18 of the United States Code, 18 U.S.C. Section 1202(a)(1) (App.), which provides:

> (a) Any person who —
>
> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or
>
> * * *
>
> and who receives, possesses, or transports in commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

Sections 5861(d), (e) and (i) of Title 26 of the United States Code, 26 U.S.C. Section 5861(d), (e) and (i) which provide:

> It shall be unlawful for any person —
>
> * * *

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record; or

(e) to transfer a firearm in violation of the provisions of this chapter; or . . .

(i) to receive or possess a firearm which is not identified by serial number as required by this chapter. . . .

STATEMENT OF THE CASE

A. Procedural History.

On August 25, 1982, petitioner was found guilty of unlawful possession and transfer of a firearm, in violation of Title 26, United States Code, Sections 5861(d), 5861(e) and 5861(i), and unlawful possession of a firearm in commerce and effecting commerce by one who has been convicted of a felony, in violation of Title 18, United States Code, Appendix, Section 1202(a)(1). Petitioner thereafter filed motions for judgment of acquittal and for a new trial, which motions were denied by the District Court.

A final judgment of sentence was imposed upon petitioner on September 17, 1982, and petitioner thereafter appealed from that judgment of sentence to the Court of Appeals.

On June 10, 1983, the Court of Appeals for the Third Circuit affirmed the judgment of the District Court.

B. Concise Statement of Facts.

Petitioner Patrick Dixon, was one of 38 persons arrested by the federal government following an undercover investigation and

disclosures by Ronald Raiton, which concerned themselves primarily with the distribution of P-2-P and methamphetamine in the Philadelphia area. Petitioner had been employed as a truck driver and came into contact with Mr. Raiton when Raiton took over the trucking company which employed petitioner. Raiton used petitioner to make deliveries and pick-ups as an employee of the trucking company and a friendship developed between them.

On July 3, 1981, Raiton was cooperating fully with the federal government. He made arrangements with petitioner on that day to bring him something described in tape recorded conversations as a "birthday present." Raiton further supplied information which had not been recorded or verified in any fashion that Dixon had told him on a prior occasion that the birthday present would be a gun and a silencer. A recorded conversation with Dixon was played setting up the meeting and Raiton's apartment was wired at the time Dixon appeared, as instructed by Raiton. Dixon brought a locked tool case to which he did not have the key and in his conversations with Raiton, never once mentioned a silencer.

The government presented no evidence of the possession of the gun and silencer other than transportation of the tool case. The jury was asked to infer that petitioner knew what was inside the tool case. The government presented one witness who testified that petitioner had not registered the silencer, as required, but that he could not have registered it anyway unless he was its manufacturer. The government further presented some records from the original manufacturer of firearms similar to this, who indicated that these kinds of firearms were manufactured in Connecticut. She did testify, however, that she could not say with certainty that the particular firearm in question was one that was manufactured by her company in Connecticut. From this, the government asked the jury to infer the necessary transportation in interstate commerce.

Petitioner was found guilty of four counts of the indictment on August 25, 1982.

REASONS FOR GRANTING THE WRIT

I.

Preliminary Statement.

This Court's Rule 17 considerations here applicable are that the District Court and Court of Appeals have so far departed from the usual course of judicial proceedings as to call for an exercise of this Court's supervisory power and have rendered a decision on an important question of federal law in conflict with the decisions of other federal courts of appeals.

The issue decided by the courts below, *i.e.*, the requisite degree of knowledge necessary to sustain a conviction for possession of a firearm and what constitutes possession, are important questions of federal law that should be decided by this Court. The decision that mere possession of a firearm constitutes a *per se* violation of 18 U.S.C. Section 1202(a)(1) (App.) and 26 U.S.C. Section 5681, absent any proof of knowledge or actual or constructive possession, represents such a radical departure from the accepted application of these sections so as to warrant the exercise of this Court's supervisory power. For these reasons a writ of certiorari should issue to review the judgment of the Court of Appeals.

II.

The Court should take this opportunity to settle the question of the requisite degree of knowledge necessary to sustain a conviction for possession of a firearm under Section 1202(a)(1) (App.) of Title 18 and Section 5861 of Title 26 of the United States Code.

Fundamental precepts of due process of law teach that the burden is on the government in a prosecution for illegal possession to prove each and every element of the crime beyond a reasonable doubt. *United States v. Goodson*, 439 F.2d 1056 (5th Cir. 1971); *United States v. Collier*, 381 F.2d 616 (6th Cir. 1967), *cert. denied*, 390 U.S. 1043; *Bryan v. United States*, 373 F.2d 403 (5th Cir. 1967).

An essential element for a conviction of possession of an unregistered firearm under 26 U.S.C. Section 5861(d), is that the government must show *knowing* possession of the item and knowledge that the item possessed is a firearm. *See United States v. Freed*, 401 U.S. 601, 607, concurring opinion of Brennan, J. at 614 (1971); *United States v. Johnson*, 562 F.2d 515 (8th Cir. 1977); *United States v. Woodruff*, 600 F.2d 174 (8th Cir. 1979); *United States v. Thompson*, 518 F.2d 534, 535 (8th Cir. 1975); *United States v. Moon*, 492 F.2d 902, 903 (8th Cir. 1974).

Similarly, under 18 U.S.C. Section 1202(a)(1) (App.), in order to sustain a conviction for possession of a weapon by a convicted felon it must be shown that the defendant *knowingly* received or possessed the firearm. *United States v. Goodie*, 524 F.2d 515 (5th Cir. 1975), *cert. denied*, 425 U.S. 905; *United States v. Sutton*, 521 F.2d 1385 (7th Cir. 1975); *United States v. Wyley*, 478 F.2d 415 (8th Cir. 1973), *cert. denied*, 419 U.S. 879.

Contrary to the decisions of the majority of circuit courts, the Court of Appeals affirmed petitioner's conviction based upon

a mere speculation that he may have had knowledge of the contents of the locked tool case which he temporarily possessed before delivery to Ronald Raiton.

Ronald Raiton had made arrangements for a delivery of a tool case to his home, which had been wired by the FBI. Petitioner testified that indeed he did bring this particular tool case to Raiton, but that it was delivered to him by someone else with instructions to take it to Raiton. He stated further that he never opened the tool case and Raiton testified that upon delivery, petitioner did not have the key to the tool box.

During the tape recorded conversations surrounding the transfer, Raiton asked petitioner if he could get a supply of presumed guns for the Irish Republican Army and petitioner replied in the negative. Petitioner testified that on an earlier occasion, Raiton had asked him to get a gun and petitioner had refused. Petitioner said he received the box which he carried to Raiton on the very day he delivered it to Raiton from an individual named Richard. He said that this meeting had been arranged by Raiton. He specifically denied that anyone had told him that there was a gun or silencer in the box. He stated that he first suspected that the box contained money and only had a suspicion that there was something else when Richard told petitioner to tell Raiton "to check it out and sight it."

Under these circumstances, it is respectfully submitted that the government failed to show that petitioner had knowing possession of either the gun or silencer which was contained inside the locked tool chest. The circuit courts have consistently held that the government must show knowing possession of the item and knowledge of the item possessed is a firearm in order to sustain

a conviction under 26 U.S.C. Section 5861.[1] The decisions below, therefore, represent a radical break from the consistent line of case law.

This departure warrants the exercise of this Court's supervisory power, and, accordingly, a writ of certiorari should issue to review the judgment of the Court of Appeals.

III.

The decisions of the courts below affirming convictions under Title 18 Section 1202(a)(1) and Title 26 Section 5861 absent proof of actual constructive possession represent such a radical departure from established case law as to warrant the exercise of the supervisory power of this Court.

It is a well-established tenet of criminal law that mere presence without more does not prove possession. *United States v. Sizemore,* 632 F.2d 8 (6th Cir. 1980), citing *United States v. Romano,* 382 U.S. 136, 141 (1965); *United States v. Birmley,* 529 F.2d 103, 107 (6th Cir. 1976).

Constructive possession requires that a person knowingly have the power or the intention at a given time to exercise dominion

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1. Even viewing the facts and inferences therefrom in a light most favorable to the government, the government fails to prove knowing possession under any circumstances. In *United States v. Johnson, supra* at 517, the court permitted an inference of knowing possession from the defendant's prior offers to sell firearms. Similarly, in *United States v. Woodruff, supra* at 176, the court distinguished intentional procurement of a firearm from inadvertent possession.

In this case, however, petitioner flatly refused prior requests for firearms and had no knowledge of the contents of the locked tool chest and lacked possession of the key which would have afforded him access to same. Therefore, no inference can be drawn to establish knowing possession.

and control over an object, either directly or through others. *United States v. Birmley, supra* at 107, citing *United States v. Craig,* 582 F.2d 29 (6th Cir. 1975); *United States v. Craven,* 478 F.2d 1329, 1333 (6th Cir. 1973). The court in *United States v. Birmley, supra* at 107 summarizes the existing case law in this regard:

> Mere presence on the scene plus association with illegal possessors is not enough to support a conviction for legal possession of an unregistered firearm. Presence alone can not show the requisite knowledge, power, or intention to exercise control over the unregistered firearm. *Birmley,* at 107-108, citing *United States v. Craig, supra; United States v. Clunn,* 457 F.2d 1273 (10th Cir. 1972); *United States v. Davis,* 346 F. Supp. 405 (D.C.D.W. Pa. 1972); *United States v. Holland,* 445 F.2d 701, 703 (D.C. Cir. 1971).

Contrary to the court's decision in *United States v. Birmley, supra,* petitioner in the instant case was convicted of illegal possession of an unregistered firearm even though he did not know the contents of the locked tool chest and did not possess the key for it.

This departure from the consistent line of case law warrants the exercise of this Court's supervisory power, and, accordingly, a writ of certiorari should issue to review the judgment of the Court of Appeals.

CONCLUSION

For the foregoing reasons, petitioner Patrick Dixon respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

HOPE C. LEFEBER
Attorney for Petitioner

F. EMMETT FITZPATRICK
Of Counsel

APPENDIX

JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 82-1569

UNITED STATES OF AMERICA

v.

PATRICK DIXON,

Appellant

(Criminal No. 82-00019-01 E.D.Pa.)

DISTRICT JUDGE: HONORABLE DONALD W. Van ARTSDALEN

Submitted Under Third Circuit Rule 12(6)
June 9, 1983

BEFORE: SEITZ, *Chief Judge*, SLOVITER, *Circuit Judge*, and SAROKIN, *District Judge*.*

After consideration of the contentions raised by appellant, to-wit, that the evidence was (1) insufficient to show that defendant

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* H. Lee Sarokin, United States District Judge for the District of New Jersey, sitting by designation.

possessed either the gun or the silencer, (2) insufficent to sustain a conviction on counts one, two and three, and (3) insufficient to show that the defendant knowingly possessed the revolver in commerce, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

s/ Seitz
Chief Judge

ATTEST:

s/ Sally Mrvos
Sally Mrvos, Clerk

Dated: June 10, 1983